

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2017-01-03 PM 2:12
CLERK

LOUIS FLORES,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
JUSTICE,

Defendant.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Case No. _____

Hon. _____

INTRODUCTION

1. Plaintiff Louis Flores brings this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, challenging the failure of Defendant, the United States Department of Justice ("DOJ"), to each of respond to Plaintiff's FOIA request (the "FOIA Request"), to approve expedited processing of the FOIA Request, and to approve the request for fee waiver within the statutorily prescribed time period. Progress Queens is seeking the disclosure and release of agency records improperly withheld by Defendant. In support thereof, Plaintiff alleges and states as follows :

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 552(a)(6)(C)(i), and 28 U.S.C. § 1331, because this action arises under FOIA, and Plaintiff has exhausted its administrative remedies.

3. Venue is proper in this district, pursuant to 28 U.S.C. § 1392(e) and 5 U.S.C. § 552(a)(4)(B). The FOIA Request sought records of Preet Bharara, the U.S. Attorney for this district (the "U.S. Attorney").

4. This Court has authority to award injunctive relief pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 2202.

5. This Court has authority to award declaratory relief pursuant to 28 U.S.C. § 2201.

6. This Court has inherent powers and authorities to impose sanctions and penalties to punish nondisclosure of records or failures to comply with the laws.

PARTIES

7. Plaintiff is the publisher of Progress Queens, an online news Web site located on the Internet at : <http://www.progressqueens.com>. Plaintiff's mission is to publish original news articles, investigations, and editorials. Plaintiff seeks to promote transparency in Government. In furtherance of his mission, Plaintiff relies on freedom of information laws to request and receive public documents to underpin some of its original news articles and investigations.

8. Defendant is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1) and is headquartered at 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001. Defendant is in control and possession of the records sought by Plaintiff.

FACTUAL ALLEGATIONS

9. The U.S. Attorney is one of the Government's most influential officials, and he has inspired the public based on his prosecutions to fight corruption. He is also known for delivering carefully-followed, news-making speeches.

10. On 08 April 2016, Plaintiff sent an e-mail to the U.S. Attorney's press office, requesting a link to a livestream or a copy of a transcript of a speech made or to be made by the U.S. Attorney at a convention of the New York Press Association in the resort town of Saratoga Springs, New York. When the request was not answered, Plaintiff made a follow-up request the following day.

11. In response to Plaintiff's requests, a press representative of the U.S. Attorney advised Plaintiff, in relevant part, that, "the office didn't send its own crew to livestream or record the event." Plaintiff protested the lack of a public record of the speech by replying, in relevant part, that, "Under FOIA, it's not an acceptable excuse for an agency to use limitations of its own making (budgetary, technology, or staff) to explain why it cannot make records public."

12. It is known that the U.S. Attorney sometimes reads from written remarks when he delivers public speeches. After the exchange of e-mails, Plaintiff spoke with the press representative of the U.S. Attorney to negotiate the release of the written remarks. The press representative informed Plaintiff that the written remarks are generally notes, and that the press representative would determine whether a conformed copy of the written remarks would be released. When Plaintiff followed up with an e-mail on 21 April 2016, about the possibility of the release of a conformed copy of the written remarks, the press representative declined to make a release of the conformed copy of the existing prepared remarks.

13. On 25 April 2016, Plaintiff filed the FOIA Request.

14. In the FOIA Request, incorporated by reference as if fully set forth herein, Plaintiff sought the following records:

A. Requested Records

1. All records and information pertaining to dates, times, hosts, locations, and other information pertaining to speeches made by U.S. Attorney Bharara since he commenced serving as U.S. Attorney for the Southern District of New York ;
2. All records, *complete* recordings in any format whatsoever (either digital or physical), *complete* transcripts, and other information pertaining to the *complete* speeches made by U.S. Attorney Bharara, including any question and answer

sessions, since he commenced serving as U.S. Attorney for the Southern District of New York ;

3. All records and information pertaining to the costs of paid by the U.S. Attorney's Office for U.S. Attorney Bharara and his staff to travel to and attend the appearances made outside of Manhattan, where U.S. Attorney Bharara has delivered speeches, including, but limited to, air fare, ground transportation, hotel accommodations, meals, entertainment, *per diem* allowances, and all other costs incidental or associated with speeches made by U.S. Attorney Bharara ; and
4. All records and information pertaining to the policies, procedures, customs, traditions, guidelines, or other instructions followed by staff of the U.S. Attorney's Office for the Southern District of New York to record in any format whatsoever (either digital or physical), transcribe, and/or preserve any recordings and/or transcriptions of the speeches made by U.S. Attorney Bharara since he commenced serving as U.S. Attorney for the Southern District of New York.

15. In the FOIA request, Plaintiff requested expedited processing.

16. In the FOIA Request, Plaintiff requested a waiver of fees.

17. Defendant sent Plaintiff two letters, each dated 23 May 2016, denying Plaintiff's request for expedited processing and informing Plaintiff not to send payment at that time then.

18. On 14 July 2016, Plaintiff offered to settle the FOIA Request as part of the settlement of an unrelated request also made under FOIA, but Defendant did not accept Plaintiff's settlement offer.

19. Defendant sent Plaintiff two letters, dated 15 August 2016, denying Plaintiff's request for a fee waiver and demanding \$1,120 to process the FOIA Request.

20. On 15 August 2016, Plaintiff sent an e-mail to the press representative of the U.S. Attorney, again requesting compliance with FOIA and requesting the release of the records.

21. On 19 August 2016, Plaintiff appealed Defendant's determinations (the "FOIA Appeal"). *See* Ex. I.

22. Defendant sent Plaintiff a letter, dated 14 November 2016. Even though Defendant had yet to answer the FOIA Appeal, Defendant announced in the letter that the "request file has been closed" for the FOIA Request.

CAUSES OF ACTION

COUNT I

Violation of the Freedom of Information Act

23. Plaintiff realleges and incorporates by reference Paragraphs 1 through 21 of this Complaint as if fully stated herein.

24. FOIA establishes a 20-day deadline by which a Federal agency must make and issue a decision regarding compliance with a request for records made pursuant to the statute. *See* 5 U.S.C. § 552(a)(6)(A)(i).

25. Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), Defendant was required to determine whether to comply with Plaintiff's request within twenty (20) days of Plaintiff having filed the FOIA Appeal.

26. Plaintiff sent his FOIA Appeal using the Government's FOIAonline.com service on 19 August 2016. Plaintiff received two e-mail acknowledgements from Defendant, the first on 19 August 2016, and the second on 23 August 2016. *See* Exs. II and III.

27. Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), the 20-day period by which the DOJ's response was due to the FOIA Appeal commenced on 19 August 2016.

Excluding weekends and Holidays, Defendant was required to make its determination and notify Plaintiff by 19 September 2016.

28. As of the date of this Complaint, Defendant has failed to notify Plaintiff of determinations, if any, made by Defendant in response to Plaintiff's FOIA Appeal or the reasons for any such determination. By closing the request file in bad faith before answering the FOIA Appeal, Defendant is flagrantly violating FOIA.

29. As of the date of this Complaint, Defendant has failed to either produce any records responsive to the request, demonstrate that responsive records are exempt from production, or resolve Plaintiff's appeal of the determinations for expedited processing and fee waiver.

30. Defendant has not requested information from the Plaintiff that would toll the 20-day period as contemplated by 5 U.S.C. § 552(a)(6)(A)(i)(I).

31. FOIA permits a Federal agency, in unusual circumstances, to extend the 20-day response deadline for a period not to exceed ten (10) additional working days. 5 U.S.C. § 552(a)(6)(B).

32. Defendant has not asserted the existence of "unusual circumstances." As such, Defendant has not implicated the tolling provision set forth in 5 U.S.C. § 552(a)(6)(B)(i).

33. There are no "unusual circumstances" that justify Defendant's prolonged delay in responding to Plaintiff's lawful FOIA Request.

34. Plaintiff has a statutory right to have Defendant process Plaintiff's FOIA Request in a timely manner and in accordance with the requirements set forth in 5 U.S.C. § 552(a)(6).

35. Defendant is unlawfully withholding records requested by Plaintiff pursuant to 5 U.S.C. § 552.

36. FOIA provides a cause of action for a complainant from whom a Federal agency has withheld requested records. 5 U.S.C. § 552(a)(4)(B).

37. Through its continued delay and outright failure to respond to Plaintiff's lawful request for records, and its improper withholding of such requested records, Defendant has failed to comply with FOIA's prescribed deadlines for responding to a request for records and has violated Plaintiff's statutory rights.

38. Pursuant to 5 U.S.C. § 552(a)(6)(C) and because Defendant failed to comply with the time limit set forth in 5 U.S.C. § 552(a)(6)(A), Plaintiff is deemed to have exhausted any and all administrative remedies with respect to the FOIA Request.

39. Plaintiff is being irreparably harmed by reason of Defendant's unlawful withholding of requested records, negatively impacting the articles written by Plaintiff, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to conform its conduct to the requirements of the law.

40. In Plaintiff's e-mail, dated 15 August 2016, Plaintiff made a showing that the U.S. Attorney is aware of his obligations to comply with FOIA, in particular, when Plaintiff noted that the office of the U.S. Attorney had "already demonstratively began to comply with or acknowledged you were required to comply with or committed yourselves to transparency that underlies FOIA when your office initiated this link on the U.S. Attorney's Web site, posting copies of speeches made by the U.S. Attorney. ¶ LINK : <https://www.justice.gov/usao-sdny/speeches>," notably adding, in relevant part, that, "This page contains speeches made in 2010, and this page has not been updated with speeches since 2014." Because the U.S. Attorney has only been partially in compliance with FOIA in the past, that means his office is not in compliance with FOIA in the present.

COUNT II

Violation of 5 U.S.C. § 552(a)(6)(E)

by Failure to Respond to Request for Expedited Processing

41. Plaintiff realleges and incorporates by reference Paragraphs 1 through 40 of this Complaint as if fully stated herein.

42. Plaintiff requested expedited processing of the FOIA request pursuant to 5 U.S.C. § 552(a)(6)(E) ; 22 C.F.R. § 171.12(b) ; 28 C.F.R. § 16.5(d) ; 32 C.F.R. § 286.4(d)(3) ; 32 C.F.R. § 1900.34(c).

43. Defendant is in violation of 5 U.S.C. § 552(a)(6)(E)(ii), in that Defendant failed to make “a determination of whether to provide expedited processing,” which “shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request.”

44. Pursuant to 5 U.S.C. § 552(a)(6)(E)(iii), Defendant’s failure “to respond in a timely manner” to Plaintiff’s request for expedited processing “shall be subject to judicial review under paragraph (4)”

45. Defendant also violated 5 U.S.C. § 552(a)(6)(A)(ii) for having failed to answer within twenty (20) days the FOIA Appeal. Because of subsequent correspondence, Defendant appears to be intentionally refusing to acknowledge Plaintiff’s FOIA Appeal, which constitutes a deliberate act of bad faith.

46. Defendant has failed to respond to Plaintiff’s request for expedited processing in a timely manner. Defendant is therefore violating 5 U.S.C. § 552(a)(6)(E)(ii).

COUNT III

Violation of 5 U.S.C. § 552(a)(4)(A)

by Failure to Waive Fees

47. Plaintiff realleges and incorporates by reference Paragraphs 1 through 46 of this Complaint as if fully stated herein.

48. Plaintiff requested a fee waiver of the FOIA Request pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ; 22 C.F.R. 171.17(a) ; *see also* 28 C.F.R. § 16.11(k)(1) ; 32 C.F.R. § 286.28(d) ; 32 C.F.R. § 1900.13(b)(2).

49. Defendant is in violation of 5 U.S.C. § 552(a)(4)(A)(iii), in particular, because the FOIA Request was made "in the public interest," as explained in the FOIA Request. Furthermore, it is in the public interest that the U.S. Attorney set a new Governmental example by complying with FOIA, so that the public can affirm its faith in the U.S. Attorney as being one of the few public officials with integrity.

50. Speaking generally of the U.S. Attorney, the press representative for the U.S. Attorney has admitted that, "He does not do a lot of one-on-one interviews, but he does a fair number of public speaking events, many of which are open to the press." Plaintiff protested the statement of the press representative by claiming, in opposition, that, "It is elitist to say that a small group of media covering an event is enough to make an event public, because it is not. The whole problem we are facing with corruption is that the corporate media is asleep at the wheel, and you know it."

51. Defendant was aware that the U.S. Attorney's speech of 08 April 2016 was set to take place under restricted circumstances. In case Defendant was not aware, Plaintiff made these restrictive circumstances plainly known to Defendant when Plaintiff wrote to Defendant on 09 April 2016, noting that, "This event was held in a resort town, behind a paywall of convention fees, to a trade

group of dues-paying members. That the trade group was composed of media is irrelevant, because the whole of the speech remains secret. Plus, not everybody can afford to travel and to pay to get in. I certainly cannot." Defendant is aware that Plaintiff earns little to no income and cannot afford thousands of dollars in fees. Because Defendant denied the fee waiver and then demanded \$1,120 to process the FOIA Request, Defendant deliberately erected an arbitrary and capricious barrier to prevent the release of records, constituting another act of bad faith.

52. When Defendant wrongly determined it would not waive the fees for the FOIA Request, even though Plaintiff's FOIA Request qualified for a fee waiver, Defendant violated 5 U.S.C. § 552(a)(4)(A)(iii).

COUNT IV

The Government's Pattern and Practise of Denying FOIA Requests

53. Plaintiff realleges and incorporates by reference Paragraphs 1 through 52 of this Complaint as if fully stated herein.

54. Contrary to each of FOIA, the President's FOIA Memorandum,^{1/} and the Attorney General's FOIA Guidelines,^{2/} the Government has made it difficult for FOIA Requests to be answered.^{3/} Frustration with the Government's failure to

^{1/} See Barack Obama, *Memorandum of January 21, 2009 : Freedom of Information Act* (Jan. 26, 2009), 74 Fed. Reg. 4683, <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/presidential-foia.pdf>.

^{2/} See Eric Holder, Jr., *Memorandum for Heads of Executive Departments and Agencies*, Office of the Attorney General (Mar. 19, 2009), <http://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>.

^{3/} See, e.g., The FOIA Project, *FOIA Lawsuits Increase During Obama Administration*, The FOIA Project (Dec. 20, 2012), <http://foiaproject.org/2012/12/20/increase-in-foia-lawsuits-during-obama-administration/> (citing a study by the Transactional Records Access Clearinghouse, noting that more Court complaints seeking to force the government to comply with FOIA were filed in the first term of the administration of the President than in the last term of the administration of former President George W. Bush, and adding that, "Partly because President Obama has, since his first few days in office, made sweeping promises about his administration's support for open government, the somewhat surprising increase in FOIA filings—especially in the last two years—adds credence to the criticism of some activists about the Obama Administration's actual commitment to this goal.");

comply with each of its legal obligations under FOIA, the President's FOIA Memorandum, and the Attorney General's FOIA Guidelines forced the leadership of the U.S. House of Representatives Committee on Oversight and Government Reform to send a letter to the Office of Information Policy of the DOJ to focus attention on concerns that included fees for accessing Government records, backlogs of FOIA Requests, and the misuse of exemptions (the "Letter to the OIP").^{4/} Furthermore, a coalition of 49 groups acted in support of the Letter to the OIP by pressing the Government to honor its obligations under FOIA.^{5/}

55. Since then, the number of complaints filed with the Courts, seeking to compel the Government to comply with FOIA, have increased.^{6/} Furthermore, in unrelated FOIA litigation between the parties in another district, Defendant has admitted to deliberately engaging in the practice of waiting for the makers of FOIA Requests to file complaints with the Courts before complying with FOIA, a sign that Defendant completely violates FOIA with impunity, including the spirit of FOIA.

Erika Eichelberger, *"Most Transparent Administration Ever" Is Still Not*, Mother Jones (Feb. 7, 2013), <http://www.motherjones.com/mojo/2013/02/darrell-issa-elijah-cummings-foia-transparency-department-of-justice> (noting that, "filing a FOIA request and getting information back is still a struggle").

^{4/} See Darrell Issa & Elijah Cummings, *Letter to Office of Information Policy*, U.S. House of Representatives (Feb. 4, 2013), <http://oversight.house.gov/wp-content/uploads/2013/02/2013-02-04-DEI-EEC-to-Pustay-re-FOIA.pdf>.

^{5/} See Jeff Plungis, *National Press Club asks President Obama to fulfill FOIA promises*, National Press Club (Feb. 25, 2013), <http://www.press.org/news-multimedia/news/national-press-club-asks-president-obama-fulfill-foia-promises>.

^{6/} See, e.g., Hadas Gold, *NYT, Vice, Mother Jones top FOIA suits*, Politico (Dec. 23, 2014), <http://www.politico.com/blogs/media/2014/12/nyt-vice-mother-jones-top-foia-suits-200325.html> (noting that the top defendant was the DOJ); Ted Bridis, *Administration sets record for withholding government files*, The Associated Press (Mar. 18, 2015), <http://bigstory.ap.org/article/ab029d7c625149348143a51ff61175c6/us-sets-new-record-denying-censoring-government-files> (noting that, "The government took longer to turn over files when it provided any, said more regularly that it couldn't find documents and refused a record number of times to turn over files quickly *that might be especially newsworthy*" (emphasis added), adding that, "in nearly 1 in 3 cases," the Government's "initial decisions to withhold or censor records were improper under the law—but only when it was challenged.").

56. Given the Government's pattern and practise of refusing to comply with FOIA until challenged, the Government has neither released records responsive to the FOIA Request nor answered the FOIA Appeal, making it impossible to know what content is in the speeches made by the U.S. Attorney, one of the Government's most powerful officials. Without this information, the public is uninformed about the thoughts, intentions, and motivations of the U.S. Attorney. In comparison, less significant Federal Government officials follow policies for making their speeches publicly-available. For example, Federal Reserve Bank officials post information about the date, location, and a transcript of their speeches on the World Wide Web, and this information is sortable by year and sometimes include hyperlinks to digital recordings of the speeches.^{7/} But for the U.S. Attorney, such *complete*, publicly-available information does not exist, perhaps by design.

57. In at least one speech, the U.S. Attorney has complained about the "substantial transparency problem throughout New York government."^{8/} However, the public does not know why the U.S. Attorney refuses to make his speeches publicly available, unless the U.S. Attorney is keeping with the Government's own pattern and practise of refusing to comply with FOIA.

PRAYER FOR RELIEF

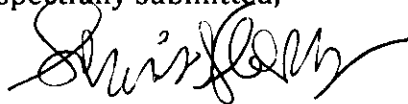
58. WHEREFORE, Plaintiff respectfully requests that the Court enter judgment against Defendant, and provide Plaintiff with the following relief :

^{7/} See, e.g., Board of Governors of the Federal Reserve System, *Speeches of Federal Reserve Officials*, Federal Reserve Bank (2016), <https://www.federalreserve.gov/newsevents/speech/2016speech.htm>.

^{8/} See Preet Bharara, *Prepared Remarks Of U.S. Attorney Preet Bharara Public Corruption In New York: More Than A Prosecutor's Problem Citizens Crime Commission*, The U.S. Attorney's Office for the Southern District of New York (22 April 2013), <https://www.justice.gov/usao-sdny/speech/prepared-remarks-us-attorney-preet-bharara-public-corruption-new-york-more>.

- (a). An Order that Defendant conduct a diligent search for any and all records responsive to Plaintiff's FOIA Request and demonstrate that it employed reasonable search methods most technologically likely to lead to the discovery of records responsive to Plaintiff's FOIA Request, selected from among those methods available to Defendant ;
- (b). An Order that Defendant produce, by a date certain, any and all non-exempt records responsive to Plaintiff's FOIA Request and a *Vaughn* index of any responsive records withheld under claim of exemption ;
- (c). An Order enjoining Defendant from continuing to withhold any and all non- exempt records responsive to Plaintiff's FOIA Request ;
- (d). A declaratory judgment that Defendant's actions violated Plaintiff's statutory rights under 5 U.S.C. § 552 ;
- (e). A declaratory judgment that Defendant is violating 5 U.S.C. §552(a)(6)(E)(ii) for its failure to respond in a timely manner to Plaintiff's requests for expedited processing and for fee waiver and injunctive relief ordering Defendant to comply with this statutory requirement forthwith ;
- (f). An Order awarding Plaintiff any reasonable attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. §552(a)(4)(E) ;
- (g). An Order declaring that the policies, patterns, and practises of Defendant, as alleged herein, violate FOIA and enjoining Defendant agency-wide from continuing these flagrant violations ;
- (h). An Order imposing sanctions and penalties on Defendant for its flagrant pattern and practise of violating FOIA ; and
- (i). An Order granting Plaintiff all further relief to which Plaintiff may be entitled.

Respectfully submitted,



Dated : Jackson Heights, New York
03 January 2017

Louis Flores
34-21 77th Street, Apt. 406
Jackson Heights, NY 11372
Phone : (929) 279-2292
louis.flores@progressqueens.com
Pro Se Plaintiff

Exhibit I

Louis Flores
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19 August 2016

FREEDOM OF INFORMATION ACT APPEAL

Office of Information Policy,
U.S. Department of Justice,
Suite 11050,
1425 New York Avenue, N.W.,
Washington, D.C. 20530.

Dear Sir or Madam :

Re : Appeal of Constructive Denial of Freedom of Information Act Request
Subject of FOIA Request : Speeches of U.S. Attorney Preet Bharara
FOIA Request Number : FOIA-2016-02319
Date of FOIA Request : 25 April 2016-08-07

I am writing to appeal the DOJ's constructive denial of the FOIA request and request the immediate disclosure of all responsive information called for by the request.

I. The Request

On April 25, 2016, I submitted a FOIA request to the DOJ seeking access to the speeches given by U.S. Attorney Preet Bharara, including records about hosting information, transcripts or recordings of any kind whatsoever, travel costs, and policies and procedures of the U.S. Attorney's Office to make this information public (the "Request") (Enclosed). In my Request, I requested expedited processing on the grounds that the information sought is about "the government's integrity which affect public confidence."

In the time since I submitted the Request, the DOJ on 23 May 2016 denied my request for expedited processing. Despite initially finding on 23 May 2016 that I "appear to qualify as a requester who is not subject to search fees," the DOJ on 15 August 2016 demanded that I submit an advance payment of \$1,120.00 in order for the DOJ to process my the Request, which I find outrageous, unconscionable, and intended as a measure to effectively deny the Request.

Separately, I have in good faith negotiated to settle this Request with the DOJ, but the DOJ rejected my offer. The DOJ's failure to respond within the statutorily-mandated time period

constitutes a constructive denial of the Request, and the reasons that the DOJ has provided for the delay are unacceptable.

II. The DOJ's Failure To Respond To The Request Within The Time Period Required By The FOIA Constitutes A Constructive Denial Of The Request.

The DOJ was required to determine its response to the Request and "immediately" notify me of its determination, at the latest, within 20 business days of its receipt of the Request. *See* 5 U.S.C. § 552(a)(6). Moreover, with respect to my request for expedited processing, the DOJ was required to make a determination within 10 days of the date of the Request. *See* 5 U.S.C. § 552(a)(6)(E)(ii)(I). However, it took the DOJ nearly 20 business days to deny my request for expedited processing.

It has now been four months since I submitted the Request, and deadlines have long since passed without the production of duly requested records by the DOJ. The failure to respond within the scope of time provided for in the code, I am deemed to have exhausted my remedies, giving rise to this appeal. *See* 5 U.S.C. § 552(a)(6)(C)(i). Furthermore, this appeal also includes an objection to the DOJ's decision to impose burdensome fees. Because the fees are so large, the imposition of large fees also acts as a way to constructively deny the Request.

The DOJ has provided no adequate justification for its failure to produce the duly requested records in response to the Request within the time period required by FOIA, whether by written notice of "unusual circumstances" or otherwise. *See* 5 U.S.C. § 552(a)(6)(B). Indeed, the DOJ has done nothing at all to respond to the Request other than to tell me that, due to the agency's own internal limitations on resources and staff, it can't or won't provide me with records of U.S. Attorney Bharara's speeches. *See* Ex. A (noting that the U.S. Attorney's Office failed to make a recording or a transcript of a speech delivered by U.S. Attorney Bharara at the resort town of Saratoga, New York). Prior to that notice, a spokesperson for the U.S. Attorney's Office had informed me that the office does not have enough people to record or transcribe speeches made by the U.S. Attorney's office, due to budget consideration. Additionally, a representative of the U.S. Attorney's Office has informed me that Federal regulations require additional work than just making a video recording available online, such as requiring that videos posted online must be compliant with the Americans With Disabilities Act (such as requiring that videos include captions for the hearing impaired). Such excuses are not acceptable under FOIA, and the DOJ is not permitted to avoid its FOIA obligations due to internal burdens of its own making. *See, e.g., Rosenfeld v. DOJ*, 2010 WL 3448517, *4 (N.D. Cal. 2010) (holding that the DOJ "cannot use the make-up of its own internal database" as a "shield to avoid FOIA mandates"). Although the need to process an abnormally large volume of requests may constitute "exceptional circumstances," a "predictable agency workload" of FOIA requests does not qualify as an "exceptional circumstance." 5 U.S.C. § 552(a)(6)(C)(ii); *see, e.g., Fiduccia v. DOJ*, 185 F.3d 1035, 1042 (9th Cir. 1999) (concluding that no exceptional circumstances exist where employee cutbacks and

budget reductions led to a "slight upward creep in the caseload" and backlog of FOIA requests at the DOJ); *see also Donham v. DOE*, 192 F. Supp. 2d 877, 882-83 (S.D. Ill. 2002) (concluding that high volume of requests and inadequate resources do not constitute "exceptional circumstances" unless such circumstances are "not predictable"). Here, the DOJ has provided no evidence of "exceptional circumstances" that would justify its failure to respond to the Request.

Given the DOJ's conduct in connection with the Request, I am left with the impression that the DOJ is taking an uncooperative stance, is not exercising due diligence in responding to the Request, or both. *See, e.g., Bloomberg v. FDA*, 500 F. Supp. 2d 371, 376 (S.D.N.Y. 2007) (holding that the FDA failed to establish "exceptional circumstances" sufficient to justify its delay in responding to Bloomberg's FOIA request and noting that "the FDA's cumulative decisions suggest a pattern of unresponsiveness, delays, and indecision that suggest an absence of due diligence"). I hereby appeal the denial of the Request, and request immediate disclosure of the information sought therein.

I also respectfully urge the DOJ to be mindful of the Attorney General's admonition that "[o]pen government requires agencies to work proactively and respond to requests promptly ... When information not previously disclosed is requested, agencies should make it a priority to respond in a timely manner. Timely disclosure of information is an essential component of transparency. Long delays should not be viewed as an inevitable and insurmountable consequence of high demand." *See United States Attorney General Eric Holder's "Memorandum For Heads of Executive Departments and Agencies,"* dated March 19, 2009, *available at*, www.justice.gov/ag/foia-memo-march2009.pdf.

III. The DOJ Was Wrong Not to Grant The Fee Waiver.

When the Courts review fee waiver issues, they do so *de novo*, and their review is generally limited to the administrative record. 5 U.S.C. § 552(a)(4)(vii). As such, let me enter into the administrative record the following information for the agency's consideration of this appeal -- and for the Court's later review, if necessary.

In accordance with FOIA case law, I want to demonstrate to the DOJ that disclosure of these records are in the public interest. The Request originated as a request I made to the U.S. Attorney's Office seeking a recording or a transcript of a speech given by U.S. Attorney Bharara. *See Ex. B* (noting that the "U.S. Attorney rarely gives interviews, and he almost never answers press inquiries."). In response, a spokesperson for the U.S. Attorney's Office acknowledged, in relevant part, that the U.S. Attorney "does not do a lot of one-on-one interviews." *See Ex. C*. In the past, the U.S. Attorney has, himself, acknowledged the importance of government transparency efforts that go beyond merely giving lip service to the cause, stating, in prepared remarks made available online that, "We should perhaps hold our applause for certain transparency measures until we've scrutinized whether they truly

reveal anything about the workings or behavior of government and public officials." *See* Ex. D. As stated in the Request, because the U.S. Attorney "routinely speaks about matters pertaining to fighting political, campaign, and corporate corruption," the "records and information sought "will help inform the public about these subject matters, particularly given that the work in which the U.S. Attorney's Office for the Southern District of New York is engaged involves a history-making series of prosecutions targeting corruption that will lead to a wave of reforms in Government and business." The public has an interest in knowing what the U.S. Attorney has to say about the subjects, since these are the subjects about which he speaks.

Once I receive these records, I intend to publish these records online, giving the public free access to these records, as I do with all records I receive in response to open records requests. I index open records requests that I expect will produce records online on a dedicated page of the Progress Queens Web site, an online news publication, which I publish.^{1/} Furthermore, many of the documents that I publish online are also available on third-party Web sites, such as Scribd.com, where the public can also conduct searches for these records. Since Scribd.com is used by many individuals, including journalists, to freely host important .PDF records, because I choose to host many records I receive from FOIA/FOIL requests on Scribd.com, the public can rely on Scribd.com as another option to locate .PDF copies of important Government records. Because the DOJ can count on me making these records freely available to the public, I have demonstrated a *prima facie* case for why the DOJ must reverse its decision to not grant a fee waiver. I have "identified why" I "wanted the administrative record, what" I "intended to do with it, [and] to whom" I "planned on distributing it..." *See Friends of the Coast Fork v. U.S. Dept. of Interior*, 110 F.3d. 53, 55 (9th Cir. 1997).

The U.S. Attorney's Office expects journalists or the public to be willing and able to pay costs in order to travel to or attend speeches given by the U.S. Attorney, and I have objected to how the U.S. Attorney's Office has demonstrated an indifference to the willingness and ability of individuals to incur these costs. *See* Ex. C. In the face of this objection, the DOJ now demands the advance payment of over \$1,000 for costs to produce what should be open records about the U.S. Attorney. The invocation of costs or fees acts to restrict or deny information or records, and this has been established to be a concern had by Congress. "Indeed, experience suggests that agencies are most resistant to granting fee waivers when they suspect that the information sought may cast them in a less than flattering light or may lead to proposals to reform their practices. Yet that is precisely the type of information which the FOIA is supposed to disclose, and agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information..." *See* 132 Cong. Rec. S14298 (Sen. Leahy). FOIA's fee waiver provision was supposed to address this concern, particularly to facilitate access to Government records by citizen "watchdog" organizations, which utilize FOIA to monitor and mount challenges to Governmental misconduct. *See Better Gov't Ass'n v.*

^{1/} *See* <http://www.progressqueens.com/foia>.

Department of State, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (noting that fee waivers were intended to benefit public interest watchdogs). Because Progress Queens advocates for Government transparency and because Progress Queens operates on almost no budget, Progress Queens depends on fee waivers in order to :

"conduct the investigations that are essential to the performance of certain of their primary institutional activities - publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions....

"The waiver provision was added to FOIA "in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests," in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups."

Better Gov't Ass'n, 780 F.2d at 93-94.

In communication I have exchanged with the U.S. Attorney's Office, I have informed the U.S. Attorney's Office that the office has not been in compliance with FOIA in respect of the speeches made by U.S. Attorney Bharara. I have drawn the U.S. Attorney's Office attention to the fact that, "Your office already demonstratively began to comply with or acknowledged you were required to comply with or committed yourselves to transparency that underlies FOIA when your office initiated this link on the U.S. Attorney's Web site, posting copies of speeches made by the U.S. Attorney,"^{2/} adding that, "This page contains speeches made in 2010, and this page has not been updated with speeches since 2014," before concluding that, " Since it can plainly be shown that your office began to comply with FOIA, then abandoned your compliance with FOIA, the gaps in information that are missing from this Web page are material to proving the U.S. Attorney's Office current lack of compliance with FOIA." *See* Ex. E. Because the U.S. Attorney has published prepared remarks he delivered before the Moreland Commission in which he emphasized the importance of transparency beyond merely giving the issue lip service, the public has every right to know, and Progress Queens has every right to demand, the records about the U.S. Attorney's speeches. Moreover, since it has been shown that the U.S. Attorney's Office is not presently in compliance with FOIA, the disclosure of these records will force the office to adopt reforms, a proposition it may not like and which may explain the DOJ's resistance to providing these records under the fee waiver request I have made. This is unacceptable.

^{2/} *See* <https://www.justice.gov/usao-sdny/speeches>.

One of the intentions of FOIA has been to promote the active oversight roles of watchdog groups, which actively challenge agency misconduct, especially in the Courts. It should be noted that I have had to sue the DOJ to compel it to comply with FOIA on an unrelated FOIA request. As such, I am fulfilling my role as a watchdog over the agency. FOIA case law has affirmed a fee waiver request under FOIA is likely to pass muster "if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government." *See McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284-1286 (9th. Cir. 1987).

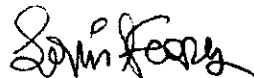
Because the DOJ has ruled against me at the administrative level on fee waiver issues, the DOJ is now bound to adhere to the reasons it has provided -- and which I have now refuted. The DOJ is not allowed to raise new issues later, if litigation is required. *See Friends of the Coast Fork v. U.S. Dept. of the Interior*, 110 F.3d 53, 55 (9th. Cir 1997). If the DOJ does not within 20 business days reverse its decision on the fee waiver and begin to produce the duly requested records, this matter will have to be decided by the Courts. *See* 5 U.S.C. § 552(a)(6)(A)(ii).

* * * *

If the DOJ fails to begin to provide records within 20 business days, then I will have no choice to commence litigation against the U.S. Attorney and the DOJ to obtain these records with the assistance of the Courts, as is my right, in accordance with 5 U.S.C. § 552(a)(4)(B). As such, please preserve all documents, correspondence, information, and things regarding this FOIA Request in anticipation of the commencement of litigation. Please note, the press office of the U.S. Attorney's Office for New York's southern district has already been notified of the need to preserve documents in anticipation of possible litigation. *See* Ex. E.

If you have any questions or concerns regarding this appeal, please do not hesitate to contact me at (718) 685-2924.

Respectfully submitted,



Louis Flores

Attachments (as stated)

Ex. A

From: **Margolin, James (USANYS)** James.Margolin@usdoj.gov
Subject: RE: Press Inquiries : (a) Transcript of NYPA speech ; (b) NYCHA ; and (c) Senate 2014 investigation
Date: 21 avril 2016 15:55
To: **Louis Flores** louis.flores@progressqueens.com
Cc: **Dearden, Dawn (USANYS)** Dawn.Dearden@usdoj.gov, **Saint-Vil, Christian (USANYS)** Christian.Saint-Vil@usdoj.gov, **Biase, Nicholas (USANYS)** Nicholas.Biase@usdoj.gov



1. There is no transcript of the US Attorney's speech in Saratoga.
2. The documents to which you refer are not public documents.
3. We have no comment on these questions.

From: Louis Flores [mailto:louis.flores@progressqueens.com]
Sent: Thursday, April 21, 2016 1:03 PM
To: Margolin, James (USANYS)
Subject: Press Inquiries : (a) Transcript of NYPA speech ; (b) NYCHA ; and (c) Senate 2014 investigation

Dear Mr. Margolin :

1/. I am just following-up on the transcript of the speech at the New York Press Association. I don't want this request to get over-looked.

2/. I am following-up on the informal request I made to see if the U.S. Attorney's Office can release critical documents from the NYCHA investigation pertaining to lead-contamination/lead-poisoning risks for NYCHA tenants. NYCHA owes me a response next week to a FOIL request I made to them for all non-exempt documents. If I don't get any documents from NYCHA, and if the U.S. Attorney's Office provides me with no documents, I will seek court assistance to aid in the release of documents pertaining to any urgent risks that NYCHA tenants face regarding lead-exposure/lead-poisoning.

3/. I am working on an update article regarding the reported Federal investigation into the funding of several Upstate/Long Island State Senate races in 2014. For my article, I only have three questions (which I need to ask) :

a/. Because the donations being made to the various county committees of the Democratic Party are timed around October 2014 (I'm looking at the Monroe County Democratic Committee, in particular), does the timing look suspicious to investigators (besides the reported concerns of funneling large donations for pass-through purposes) ?

b/. Making donations in October appear to be too late in the election cycle to make any difference with (less than) one month to go before the general election that year then. What is more, all of the campaign committees reportedly receiving money from the county Democratic Party committees eventually lost their races. Because many of the donations made, particularly to the Committee to Re-Elect Ted O'Brien, passed back to AKPD and BerlinRosen, in the minds of investigators, what was the real, business-purpose use of the payments made to AKPD and BerlinRosen ?

c/. I have seen before where campaign consultants attach themselves to big money races that face the real prospect of losing, just so that the campaign consultants can earn extra billings. In the minds of investigators, is that what happened here ? Or is it more, because perhaps the

campaign consultants were informed about, or had a role in, the fundraising from which they themselves knew that they were going to benefit ?

My deadline is not until tomorrow at noon, if your office can give me any responses/comments, I would appreciate it.

Thank you kindly.

Best regards,

-- Louis

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Ex. B

From: **Louis Flores** louis.flores@progressqueens.com
Subject: **Re: Press Inquiry : Was there a live stream of U.S. Attorney Bharara's speech today ?**
Date: 9 avril 2016 10:55
To: **James Margolin** james.margolin@usdoj.gov



Hi, Mr. Margolin :

I don't want this request to get lost.

The U.S. Attorney rarely gives interviews, and he almost never answers press inquiries.

Because of that, it is important that his speeches be made public, because it gives the public one of its only opportunities to hear the U.S. Attorney speak.

Yesterday, before I made my request to you, I searched the NYPA Web site, and there is no link of a video.

Just now, I have run updated searches on YouTube and Google, and I have turned up nothing.

If the U.S. Attorney gives closed-door speeches, he must require that a video, recording, or transcript be released.

Please let me know if you can provide a link or a transcript.

Thank you.

Louis Flores
Publisher
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On April 8, 2016 at 5:22 PM Louis Flores <louis.flores@progressqueens.com> wrote:

Dear Mr. Margolin :

Was there a stream of U.S. Attorney Preet Bharara's speech today at the New York Press Association ? Alternatively, is there a transcript of his remarks ?

If so, can you provide a link or a file ?

Thank you kindly.

Best regards,

-- Louis

Ex. C

From: **Louis Flores** louis.flores@progressqueens.com
Subject: **Re: Press Inquiry : Was there a live stream of U.S. Attorney Bharara's speech today ?**
Date: 9 avril 2016 12:58
To: **Margolin, James (USANYS)** james.margolin@usdoj.gov
Cc: **Dearden, Dawn (USANYS)** dawn.dearden@usdoj.gov
Bcc: **Louis Flores** louis.flores@progressqueens.com



I don't want to get into a war of words with you.

It is elitist to say that a small group of media covering an event is enough to make an event public, because it is not. The whole problem we are facing with corruption is that the corporate media is asleep at the wheel, and you know it.

This event was held in a resort town, behind a paywall of convention fees, to a trade group of dues-paying members. That the trade group was composed of media is irrelevant, because the whole of the speech remains secret. Plus, not everybody can afford to travel and to pay to get in. I certainly cannot.

And before you say that this is all about me, what I'm saying here is the public has a right to know. You arguably don't owe me a link or a transcript, but the Office of the U.S. Attorney certainly owes this much to the public, because the U.S. Attorney is a public official, and probably one of the most significant ones at that.

I hate to say it, but perhaps it's time for the U.S. Attorney's Office to consider having a press person to make arrangements to have a crew to livestream or record these kinds of events. Under the law, not having staff is no excuse. Under FOIA, it's not an acceptable excuse for an agency to use limitations of its own making (budgetary, technology, or staff) to explain why it cannot make records public. *See Rosenfeld v. DOJ*, 2010 WL 3448517, *4 (N.D. Cal. Sept. 1, 2010) (holding that the DOJ "cannot use the make-up of its own internal database" as a "shield to avoid FOIA mandates").

Please consider this e-mail chain a request under the Freedom of Information Act for a recording, or a copy of the transcript, of the Friday speech at the New York Press Association.

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On April 9, 2016 at 12:20 PM "Margolin, James (USANYS)" <James.Margolin@usdoj.gov> wrote:

Louis:

You are of course free to express your opinion, but I am simply trying to explain that the office didn't send its own crew to livestream or record the event, and the organizers either didn't have the ability or didn't see the need to livestream it. It wasn't an attempt on our part to keep people from seeing Mr. Bharara's talk. He does not do a lot of one-on-one interviews, but he does a fair number of public speaking events, many of which are open to the press. Many of your colleagues in the press would no doubt concur with that assessment.

Jim

Sent from my iPhone

On Apr 9, 2016, at 12:05 PM, Louis Flores <louis.flores@progressqueens.com<mailto:louis.flores@progressqueens.com>> wrote:

You and I know that the press doesn't report everything.

I think it is duplicitous to give lip service to the press this way ("his topic was the role of a free press in society"), and then hide behind that to withhold/deny a recording or a transcript for the public to read.

I will write an editorial about this tomorrow.

On April 9, 2016 at 11:21 AM "Margolin, James (USANYS)" <James.Margolin@usdoj.gov<mailto:James.Margolin@usdoj.gov>> wrote:

"[H]e must require that a video, recording, or transcript be released"? He was a guest at the event. He didn't make the arrangements, he accepted an invitation to speak. It was not only open to the press, it was an audience composed entirely of members of the press, and his

topic was the role of a free press in society.

Sent from my iPhone

> On Apr 9, 2016, at 10:56 AM, Louis Flores <louis.flores@progressqueens.com<mailto:louis.flores@progressqueens.com>> wrote:
>
> he must require that a video, recording, or transcript be released.

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Ex. D



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Justice News

Prepared Remarks Of U.S. Attorney Preet Bharara Public Corruption In New York: More Than A Prosecutor's Problem Citizens Crime Commission

United States ~ Monday, April 22, 2013

I want to thank Richard Aborn and the Citizens Crime Commission for inviting me and for organizing events like this.

Before I get started, please silence your cell phones and body wires, as the case may be.

Why am I here this morning and why am I talking about this?

Because public corruption in New York, from all the available evidence, appears pervasive and because it is more than a prosecutor's problem.

Recent and not-so-recent events paint a fairly dismal portrait of the state of government in the State of New York.

It is a portrait of a show-me-the-money culture, as I have said before.

It increasingly seems that the best way to find Albany on a map is to look for the intersection of greed and ambition.

So is corruption in New York rampant and is it worse than elsewhere? All the available evidence says that the answer, sadly, is yes.

Given recent events, I am reminded of a great and funny science fiction book I read when I was a kid—The Restaurant at the End of the Universe, by Douglas Adams. It describes an alien warrior species known as Vogons. In chapter two, the author describes a particular Vagon captain:

"It has been said that Vogons are not above a little bribery and corruption in the same way that the sea is not above the clouds. . . . When [this Vagon captain] heard the words 'integrity' or 'moral rectitude,' he reached for his dictionary, and when he heard the chink of ready money in large quantities he reached for the rule book and threw it away."

Sound familiar?

So, is Albany full of Vogons? Of course not.

To be sure, there are countless honorable and ethical and honest people serving in elected office—people who believe that representing ordinary Americans is a high calling, a calling to improve one's community and one's country in some small measure.

But I don't think anyone can disagree with the conclusion that the ranks of those convicted in office have swelled to unacceptable levels.

Consider the list of defendants convicted by just our Office in recent years.

It is the kind of roll call that causes frustrated prosecutors to wonder, from time to time, whether our most corrupt public officials are even capable of being deterred from committing crimes:

- Senator Carl Kruger
- Senator Hiram Monseratte
- Senator Nicholas Spano
- Senator Vincent Leibel
- Senator Efrain Gonzalez
- Assemblyman Brian McLaughlin
- Assemblyman Anthony Semerino
- Councilman Larry Seabrook
- Councilman Miguel Martinez
- Councilwoman Sandy Annabi

And that does not count the plethora of pending cases that are still playing out in federal court in the Southern District.

Nor does it count the significant public corruption cases brought by other prosecutor's offices around the state.

Consider also the breadth and diversity of the officials caught up in our corruption probes:

- They have been State Senators as well as State Assemblyman.
- Elected officials as well as party leaders.
- City council members as well as town mayors.
- Democrats as well as Republicans.
- In an age often decry for increasingly bitter partisanship, we can say that public corruption in New York is a bipartisan affair.

Or, consider what some recent arrested politicians have been caught on tape allegedly saying about the pervasiveness of a corrupt mindset:

- One Assemblyman allegedly said this, talking about his Albany colleagues: "Bottom line. . . if half of the people up here in Albany was ever caught for what they do...they...would probably be [in jail], so who are they BS-ing?"
- A city councilman allegedly said this: "That's politics, that's politics, it's all about how much...and that's our politicians in New York, they're all like that, all like that. And they get like that because of the drive that the money does for everything else. You can't do anything without the f***ing money."

What's more, the examples of tawdry graft spelled out in recent complaints and indictments evince both a casualness and a cockiness about corruption in New York in 2013—and suggest, dispiritingly, that not a lot has changed.

Some of the allegations have a positively retro feel to them.

Take, for example, a recent case where officials first met at Sparks Steakhouse on Valentine's Day of this year and then retired to parked vehicles to exchange envelopes of cash in connection with a bribery scheme.

It makes you want to ask, with some frustration: "What is this? The eighties?" Have we not progressed at all?

Now, one of the most commonly asked questions about public corruption is: Why? Why do we have this problem, however extensive one thinks it is? Why do officials who are supposed to hold the public trust and who are supposed to know better keep breaking the law—even knowing what the consequences will be?

I'm not a behavioral psychologist or a political pundit or a social scientist, so I don't really know the answer. The answer may not be knowable, and probably there is no single answer, even if it were

knowable.

I suppose it is some combination of hubris and greed and ambition on the part of corrupt and corruptible officials.

I suppose, also, that there are temptations in the system, weaknesses in oversight, and gaping holes in transparency.

But at the end of the day, it seems that a culture of corruption has developed and grown, just like barnacles on a boat bottom.

And it seems that such a culture has become so embedded that even a series of tough and successful prosecutions that have separated so many lawmakers from their liberty has not been enough to thwart others from following in their felonious footsteps.

And just as with barnacles on a boat bottom, when a growth is permitted to spread and grow unchecked, it unsurprisingly takes an unrelenting, collective effort to clean up.

And so after such a disheartening spate of scandals, it is heartening to see that many people are beginning to take the problem more seriously than perhaps they have until now.

And that is good because state lawmakers matter.

State legislators, believe it or not, are important.

Each senator represents more than 300,000 people; each assemblyman, almost 130,000.

Senators confirm appointments of state officials and court judges.

State lawmakers determine our budget. They decide how much money goes to children's education, to public safety, to transportation, to health, and to public welfare. They decide what constitutes a crime and how it should be punished. And they draw the boundaries of the electoral districts in which you live, work, and vote.

So it is dispiriting that the public's increasing sense of disillusionment with their government has reached unprecedented proportions.

A Quinnipiac poll from just a week ago found that 87 percent of New Yorkers said that corruption in the state is a "somewhat serious" or "very serious" problem. Eighty-seven percent.

And the percentage of those saying it is a "very serious" problem is the highest mark since Quinnipiac began asking the question ten years ago.

But perhaps it should not be all that shocking that so many people have lost so much faith.

When a New York state senator is more likely to be arrested by the authorities than defeated in an election, people lose faith.

When voters' campaign contributions can routinely foot the bill for a fancy lawyer when that legislator is later charged with corruption, people lose faith.

When state senators are advised by the majority leader's counsel—in writing!—to hand deliver their financial disclosure forms to avoid federal mail fraud charges, people lose faith.

When a state legislator can be convicted of corruption crimes and still keep his life-long pension, people lose faith.

Such a dynamic gives new meaning to what Michael Kinsley once said: "The scandal isn't what's illegal; the scandal is what's legal."

So let's just pause for a moment to see if we have this straight: In New York, a politician can figure out a way to buy his way onto a ballot and into the legislature; upon election, he can turn around and sell that very office to the highest bidder for favorable votes; upon indictment, he can use former supporters' campaign contributions to fight the criminal charges; upon conviction, he can be forced out of office and

imprisoned for years.

But he will retain for life a generous state pension—paid for by whom? The taxpayer. And that right is enshrined where? In the state constitution. And that is written by whom? The legislature.

Now, does anyone who is not drunk on power or addicted to self-dealing think this is remotely rational?

Just so we're clear, I, of course, have no formal opinion on this. I'm just sayin'.

Now, we all have a role in addressing this problem.

Prosecutors, of course, have an important role.

Before getting to that, let me say a few things about our overall approach to public corruption.

First, let me make clear what our mission is not about:

We are not trying to criminalize ordinary politics.

We are not trying to wag our fingers or thump our chests.

Nor, quite frankly, are we even demanding that our government officials be virtuous or vice-free.

We are prosecutors, not morality cops.

We simply want people in high office to stop violating the law. It seems like a simple and modest request—people elected to make laws should not break them.

Prosecuting public corruption, for the most part, is like prosecuting every other type of crime. As with every other area, we are fundamentally fearless and appropriately aggressive. We go wherever the facts and the law take us.

But there are at least two considerations that are perhaps special to public corruption cases.

First, corruption investigations are especially sensitive—among the most sensitive that any prosecutor can conduct.

For that reason, we take great care to make sure that we are as cautious and discreet as we can possibly be when conducting investigations of public officials.

We would be doing a public disservice if we were to unnecessarily cause reputational harm to someone who was duly elected or appointed to high office.

But that said, we have an obligation to investigate vigorously all criminal misconduct no matter where it may be happening and no matter who may be responsible.

No one is above the law, no matter how wealthy or important, and no matter how many votes he or she may have garnered in the last election.

Where there is smoke, there is often fire—that conclusion has become irrefutable over the last few years. And we are duty-bound to go where the smoke is.

Second, we have a fierce dedication to political neutrality and independence—bedrock principles that are particularly important in how we go about handling corruption cases.

Every prosecutor's office must guard its independence—from politics and from partisanship and from undue pressure, whether from the public or from Washington.

The U.S. Attorney's Office for the Southern District of New York has an especially long and proud tradition of absolute independence.

After all, we were founded in 1789; we have prosecuted some of the most storied cases in the history of the nation; and we have shown time and again that no individual or institution is beyond the law's reach.

There is a reason we are known as the Sovereign District of New York. And while some may view that as

a pejorative, we view it as a badge of honor, and it confers particular legitimacy on our public corruption investigations.

For my own part, before I became the U.S. Attorney, while I was a counsel to the Senate Judiciary Committee, I spent close to a year leading the investigation into politicization at the Justice Department.

And so I know first-hand what can happen to public trust when even a whiff of politics or political ideology enters into prosecutorial thinking.

As a friend of mine once remarked, there are three political parties—Republican, Democrat, and federal prosecutor.

Now, before I say more about the prosecutor's role, let me point out that a portion of our anti-corruption team is here this morning.

Seated are the Deputy U.S. Attorney Richard Zabel, Criminal Division Chief Lorin Reisner, Public Corruption Chief Brendan McGuire and a number of corruption Assistant U.S. Attorneys.

I get to make speeches from time to time, but these are the career prosecutors who do all the work and deserve all the credit.

These are the career prosecutors who have shone such a bright line on the corruption problem in Albany and elsewhere.

So, what is our strategy for, and our role in, fighting corruption?

It's a very simple one.

We bring criminal cases. And we will bring any case that we can prove beyond a reasonable doubt to a unanimous jury.

But a couple of updates.

First, given the unmistakable pervasiveness of corruption, we are redoubling our efforts and will seek to be even more aggressive than in the past, and you have seen some of the fruits of that resolve in recent weeks.

So what does that commitment mean?

It means being as aggressive and proactive on public corruption as we are on gangs and drugs and organized crime and insider trading and everything else—because whenever corruption is on the rise, that means democracy is on the decline.

And that means that law enforcement will use every aggressive and creative tool at our disposal—wiretaps and confidential informants and undercover agents and stings. And, yes, seeking the cooperation of elected officials who can help us investigate and prosecute their own corrupt colleagues.

It means, also, adding resources to the fight. In the last 18 months, we have added people to our public corruption unit so that we can be more effective.

In addition, I have recently met with the Assistant Director in Charge of the FBI, George Venizelos, to discuss expanding our corruption efforts. And I can tell you that he shares my view that corruption should be an absolute top priority for federal law enforcement in New York. We will also continue to work with the fine men and women of the Department of Investigation, led by Commissioner Rose Gill Hearn, who has been one of the pioneers in fighting corruption.

We also met recently with leaders of watchdog groups to see if there are other ways we can be effective.

Our goal is to change the calculus of even the most dense public official—so that he or she will finally realize that the reward for violating the oath of office is not reelection, but prison.

Now, of course, there are other excellent prosecutor's offices throughout New York State, both local and federal.

And I agree with the proposition that we could use even more cops on the beat. God knows, there is no shortage of public corruption work.

But no matter how many cops on the beat, I think the feds will always be natural leaders on corruption matters.

Federal prosecutors are natural leaders in this area because (1) we generally have deeper resources (to introduce undercovers, mount stings, and pay controlled bribes, among other things); (2) we have a track record of success; (3) we can usually threaten more substantial penalties; and (4) as I already mentioned, we have a generations-old tradition and reputation for absolute independence and nonpartisanship.

But we welcome more cops to the beat, and in fact have been collaborating with local offices for a long while—our recent work with DA Robert Johnson of the Bronx and DA Thomas Zugibe of Rockland, I think, serve as state-wide models for cooperation. And I hope we build on that model.

So, we prosecutors will keep doing our jobs—aggressively and collaboratively. And if that means locking up more corrupt officials, so be it.

But we cannot just prosecute our way to cleaner government, and in any event we face a number of challenges even in our law enforcement efforts. Let me mention just a couple.

First, there is a substantial transparency problem throughout New York government.

You may remember our successful CityTime investigation, in which we partnered with Commissioner Hearn and DOI—that was the case in which a government contractor, SAIC, bilked the city for about half a billion dollars for a timekeeping software program.

As that investigation revealed, disclosure requirements, when not sufficiently rigorous, can provide a false sense of security and the illusion of transparency. Currently, only prime contractors and first-tier subcontractors doing work for the City file financial disclosures.

So apparently all you have to do to conceal a fraud and deceive the City is set up a sham second-tier subcontractor. In CityTime, that approach resulted in the City being victimized year after year to the tune of more than half a billion dollars.

Fortunately, as a result of our case against the prime contractor, the City has been made whole. But that may not happen next time. That is something to think about.

One more point on this—the creation of databases and websites which make certain information about government officials public, which seem to promote transparency and are unveiled to great fanfare are a step toward true transparency but by themselves are not enough.

A database that is accessible only by physically going to a city office building to access through an outdated computer portal does not accomplish its intended purpose.

A government website that is so difficult to navigate that it is nearly impossible to piece together any real-life understanding of the information it purports to convey or that offers millions of rows of data but without any context or meaningful ability to conduct analysis is not that much more helpful than keeping the information locked away in a filing cabinet.

We should perhaps hold our applause for certain transparency measures until we've scrutinized whether they truly reveal anything about the workings or behavior of government and public officials.

A related transparency challenge is the difficulty of being able to separate illicit money transfers from legitimate ones.

We believe in the old adage: Follow the money.

But that is so much harder to do when the money trails are hidden. When every state or local elected official is able to lawfully moonlight as a lawyer or accountant or consultant and may lawfully withhold deep details of that work, prosecutors face substantial challenges.

Again, I don't have a formal view on these things. I'm just sayin'.

And there are challenges beyond transparency problems as well.

As I mentioned recently, perhaps most disheartening is the deafening silence of the many individuals who, over the course of this investigation (and others), saw something and said nothing. They learned of suspicious and potentially criminal activity being conducted in the halls of the Capitol and elsewhere, and they said nothing. No one made a call. No one blew the whistle. No one sounded the alarm.

As I keep saying, corruption is more than a prosecutor's problem, and everyone with a stake has to be part of the solution. That means the politicians, the press, and the public have a vital role to play also.

First, the role of politicians, of lawmakers.

Apart from refraining from breaking the law, the single most important thing they can do to restore public trust is to act seriously and earnestly to reform the system and the culture of our government and our politics.

There have been a lot of proposals offered in recent days, and every New Yorker should applaud the effort. And we prosecutors applaud any effort that makes our jobs easier.

The proposals are wide-ranging—there are measures to limit contributions, to limit spending, to limit terms, to limit discretionary funds. There are measures to repeal certain laws and mandate more transparency and compel the reporting of crime.

I am not in a position to offer opinions on particular proposals—but I do agree with those who say no single fix will get us far down the road to reform. And nothing will really change until people undertake a fundamental reform of a corrupt culture.

After all, notwithstanding all the challenges I mentioned, every single one of the cases that my office has brought was possible under existing authorities and existing resources.

But it makes sense for everything to be on the table in terms of proposals.

And I will say one more thing: speaking as not just a prosecutor but also as a citizen of the state, New Yorkers should not settle for something weak when there is an appetite and an opportunity for something strong.

Now, what about the Fourth Estate? Does the press have a role?

Absolutely.

The press is often in the best position to investigate, and shine a light on, corrupt officials and corrupt practices.

My chief lament about the decline of the local newspaper is that with each outlet that closes, opportunities to ferret out fraud and public waste and abuse are lost.

Just as we and the FBI are adding resources to fight public corruption, if you run a newsroom, I would hope you would think of adding reporters and resources to the investigative side of the business. I bet it's as fun a beat as a reporter can have.

So all of you press folks back there, tell your editors I said that.

Rather than just covering cases that my office and others are already bringing, figure out ways to break new ground, to cover new stories.

Groundbreaking corruption coverage, by the way, is not just good copy; it is a path to good government.

Finally, what about the public? That is where the solution really lies.

People need to demand more. It is not enough just to be fed-up.

After all, as Edward R. Murrow observed, "A nation of sheep will beget a government of wolves."

The public has to demand more—individual voters acting and speaking collectively.

New York tends to have the best of everything, and it deserves better in this area also.

New York is home to the safest large city in America; it should not harbor one of the most corrupt governments in the nation.

New York is full of the best problem-solvers anywhere.

And no state has people who are more thoughtful, more industrious, more resilient, more demanding, and more impatient than New York.

And if there were ever a time for New Yorkers to show their trademark impatience with the status quo and to show it loudly, it is now.

Thank you.

USAO - New York, Southern

Updated May 13, 2015

Ex. E

From: **Louis Flores** louis.flores@progressqueens.com
Subject: **Press/Litigation Inquiry : FOIA request for speeches by the U.S. Attorney (Follow-up)**
Date: 15 août 2016 10:55
To: **Margolin, James (USANYS)** James.Margolin@usdoj.gov, **Biase, Nicholas (USANYS)** Nicholas.Biase@usdoj.gov,
Dearden, Dawn (USANYS) Dawn.Dearden@usdoj.gov
Bcc: **Louis Flores** louis.flores@progressqueens.com



Dear Mr. Margolin :

I am in receipt of correspondence from the EOUSA, further denying elements of my FOIA request, in addition to now stalling the production of records until I pay over \$1,000 in fees, which I find outrageous, objectionable, and unconscionable.

I will file the appeal with the OIP as soon as practicable, to follow the administrative procedures of FOIA.

Since I made my initial request to the Press Office for speeches made by the U.S. Attorney, I hereby ask the Press Office, in addition to the U.S. Attorney's Office, to preserve all correspondence and documents regarding this FOIA request in the event that litigation becomes necessary, in accordance with 5 U.S.C. § 552(a)(4)(B).

Your office can avoid litigation, if you just simply comply with FOIA, as you are required to do.

Your office already demonstratively began to comply with or acknowledged you were required to comply with or committed yourselves to transparency that underlies FOIA when your office initiated this link on the U.S. Attorney's Web site, posting copies of speeches made by the U.S. Attorney.

LINK : <https://www.justice.gov/usao-sdny/speeches>

This page contains speeches made in 2010, and this page has not been updated with speeches since 2014.

I now have a back-up copy of this Web page at : <http://archive.is/ZhcdG>

Since it can plainly be shown that your office began to comply with FOIA, then abandoned your compliance with FOIA, the gaps in information that are missing from this Web page are material to proving the U.S. Attorney's Office current lack of compliance with FOIA.

I have already offered the U.S. Department of Justice an opportunity to settle this FOIA request, but my settlement offer was rejected. Before I commence any litigation after I file the OIP appeal, please let me know if U.S. Attorney intends to comply with FOIA.

Thank you.

Louis Flores
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1 (929) 279-2292

Web : <http://www.progressqueens.com>
Twitter : @ProgressQueens
Donate : <http://www.progressqueens.com/donate/>

Exhibit II

OIP-NoReply@usdoj.gov <oip-noreply@usdoj.gov>

8/19/2016 3:03 PM

FOIA Appeal DOJ-AP-2016-004870 Submitted

To louis.flores@progressqueens.com <louis.flores@progressqueens.com>

This message is to notify you of a new appeal submission to the FOIAonline application. Appeal information is as follows:

- Appeal Tracking Number: DOJ-AP-2016-004870
- Request Tracking Number: FOIA-2016-02319
- Requester Name: Louis Flores
- Date Submitted: 08/19/2016
- Appeal Status: Submitted
- Description: See attached. I'll see you in Court soon.

Exhibit III

OIP-NoReply@usdoj.gov <oip-noreply@usdoj.gov>

8/23/2016 12:51 PM

FOIA Expedited Processing Disposition Reached for DOJ-AP-2016-004870

To louis.flores@progressqueens.com <louis.flores@progressqueens.com>

Your request for Expedited Processing for the FOIA request DOJ-AP-2016-004870 has been denied. Additional details for this request are as follows:

- Request Created on: 08/19/2016
- Expedited Disposition Reason: Your request for expedited handling of your appeal is denied. You have not provided a statement certified to be true and correct, nor have you explained which of the four expedited processing standards set forth in the Department of Justice regulations would apply to your appeal. See 28 C.F.R. 16.5(e)(3). Your appeal is currently being processed and this Office will respond to you once a final determination has been made on your appeal.
- Request Long Description: See attached. I'll see you in Court soon.